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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 128

RONALD U. TILLEY, PETITIONER

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

ARTHUR M. FITZGERALD,
504 East Monroe Street,
Springfield, Illinois.
Attorney for Petitioner.

SCHARF & BROWN, PRINTERS, SPRINGFIELD, ILL.

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No.———

RONALD U. TILLEY, PETITIONER

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Illinois, entered January 24, 1952, affirming a judgment and sentence of the Circuit Court of Sangamon County, Illinois, finding the defendant guilty of the crime of manslaughter and sentencing him to the penitentiary for a minimum term of not less than four and for a maximum term of not to exceed ten years. A petition for rehearing was filed. This was denied upon March 17th, 1952, making the judgment final.

Opinion of the Illinois Supreme Court

Opinion of the Supreme Court of Illinois entered January 24, 1952, is printed as an appendix to this petition for the convenience of the Court.

Basis of Jurisdiction

Jurisdiction is invoked under the Fifth and Fourteenth Amendments to the Constitution of the United States, and under Article II, Secs. 2, 5 and 9 of the Bill of Rights, Constitution of the State of Illinois, because the judgment of the Circuit Court and the affirmance thereof by the Supreme Court of Illinois, has deprived petitioner of due process of law, guaranteed by the foregoing Constitutional provisions. The Illinois constitutional provisions are as follows:

Illinois Constitution 1870, Bill of Rights, Art. II.

Sec. 2. No person shall be deprived of life, liberty or property without due process of law.

Sec. 5. The right of trial by jury as heretofore enjoyed shall remain inviolate.

Sec. 9. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel . . . and to a speedy public trial by an impartial jury, etc.

(The due process language of the Fifth and Fourteenth Amendments to the Federal Constitution is identical with Sec. 2, Art. II of the Illinois Constitution, above quoted).

Question Presented

Petitioner was indicted by a Grand Jury of Sangamon County, Illinois, and placed on trial, charged with murder by abortion. The jury was chosen and the trial had.

The jury retired approximately at the hour of nine o'clock on Saturday night, February 10, 1951, and on the morning of Sunday, February 11, 1951, between the hours of 7:30 and 8:00 o'clock A.M., the Judge who presided at the trial of his own volition went to the jury room, out of the presence of the defendant and his counsel, when court was not in session, and the following occurred:

The Judge said:

> "I went to the jury room with the bailiff and stood outside the jury room with the bailiff. I said is there any hope of arriving at a verdict. The jury said they wanted some further information. I said for the jury to read the instructions they had. I explained that I would have to call the attorneys and the defendant back and give new instructions in writing. A juror asked the meaning of the statement read to the jury. I answered, you have two instructions on that. Jury asked if the defendant admitted performing an abortion. I said, no, he specifically denies it." (Rec. 286, Tr. 77.)

Petitioner contends that under the law of the State of Illinois, (Bill of Rights, Art. II, Secs. 2, 5 and 9), and under the Fifth and Fourteenth Amendments of the Constitution, he has been deprived of due process, and has not had a fair and impartial public trial as required by both the Constitutions of the United States and the State of Illinois.

Reasons for Granting the Writ

Confusion exists in the various states, and has heretofore, and still exists, in the courts of the United States, in regard to communications from the Court to the jury, after the jury has retired to consider its verdict. Prior to the decision of this Honorable Court, in the case of Brashfield vs. United States, 272 U. S. 448; 71 L. ed. 345, great confusion existed in the decisions of the United States Circuit Courts of Appeals, with reference to inquiries by the trial judge

as to how the jury stood. The decision in the Brashfield case was followed in the case of Sheilds vs. United States, 273 U. S. 583, and these decisions removed the confusion which existed upon this particular matter.

However, the invasion of the sanctity and privacy which the law contemplates should be accorded deliberations of the jury, without private suggestions of any kind either from the court or others, after it has retired to consider its verdict, is constantly subject to abuse by the assumption, innocently perhaps, that such suggestions may expedite the determination of the case. The danger involved is apparent. The question presented by the facts in this case, discloses that opportunity for a miscarriage of justice is afforded by any visit of the trial judge to the jury room, out of the presence of the defendant and his counsel. This is particularly true when the jury has been deliberating and apparently unable to agree for approximately eleven hours, at the end of a week and upon Sunday morning, as in this case. The preservation of the freedom and sanctity of a jury's deliberations is much more important than the guilt or innocence of any defendant in any case. If the integrity of the jury system be breached as in this case, if a trial judge be permitted without request from the jury and in the absence of the accused to inject his presence, his words, his interpretation of evidence, into the jury room then truly the jury system with all of its constitutional safeguards and guarantees is completely destroyed.

Wherefore, it is respectfully submitted that this Petition for the Writ of Certiorari to review the judgment of the Supreme Court of the State of Illinois should be granted.

ARTHUR M. FITZGERALD,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement of Facts

The facts pertinent to the question presented are set forth sufficiently in the petition under the heading, "Question Presented."

Assignments of Error

1. The Supreme Court of Illinois erred in holding that the private visit of the trial judge to, and communication with, the jury when Court was not in session and while petitioner and his counsel were absent, did not deprive him of due process.

2. The Supreme Court of Illinois erred in not holding that the visit of the trial judge to the jury deprived the petitioner of his right to a public trial while he is present.

3. The Supreme Court of Illinois erred in not holding that the communication and visit by the judge to the jury deprived the petitioner of his rights as provided by the Bill of Rights of the Illinois Constitution and by the Constitution of the United States.

4. The oral discussion, questions by jurors and responses by the trial judge denied petitioner due process of law in that it was a direct violation of the Illinois Statutory provisions (Chp. 110, Par. 191, Smith-Hurd Stat. 1951) which provides that the Court "shall in no case clarify, modify or in any manner explain the instructions otherwise than in writing."

PROPOSITIONS OF LAW

I.

The Opinion of the Supreme Court of Illinois deprives Petitioner of the protection guaranteed by the Illinois and Federal Constitutions.

Illinois Constitution 1870, Bill of Rights, Art. II.

Sec. 2. No person shall be deprived of life, liberty or property without due process of law.

Sec. 5. The right of trial by jury as heretofore enjoyed shall remain inviolate.

Sec. 9. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel . . . and to a speedy public trial by an impartial jury, etc.

(The due process language of the Fifth and Fourteenth Amendments to the Federal Constitution is identical with that of Sect. 2, Art. II of the Illinois Constitution).

II.

The Statutes of Illinois require that all instructions to the jury be in writing.

> "The Court shall give instruction to the jury only in writing and only as to the law of the case . . . and he shall in no case, after instructions are given, clarify, modify or in any manner explain the same to the jury, otherwise than in writing."
>
> **Ill. Practice Act—Chap. 110, Par. 191, Smith-Hurd Stat. 1951;**
>
> **People vs. Kelley, 347 Ill. 221;**
>
> **People vs. Grandstaff, 324 Ill. 70;**
>
> *Crabtree vs. Hagenbaugh*, 23 Ill. 289;
>
> *People vs. Beck*, 305 Ill. 593.

III.

From the admission of Illinois to the Union in 1818, until the decision of People vs. Brothers, 347 Ill. 530, every criminal conviction (and civil verdicts also) was reversed where the record showed that the jury was instructed verbally or where proceedings were held in the absence of the accused, or the parties.

Fisher vs. The People, 23 Ill. 218 at 231;
People vs. Beck, 305 Ill. 593 at 596;
Crabtree vs. Hagenbaugh, 23 Ill. 349;
People vs. McGrane, 336 Ill. 404;
Chicago & Alton Ry. vs. Robbins, 159 Ill. 598;
City of Mound City vs. Mason, 262 Ill. 392.

IV.

The principle involved in this case has been adhered to in recent Illinois Supreme Court decisions.

People vs. McMiller, 410 Ill. 338 (decided Nov. 1951);
People vs. Rivers, 410 Ill. 410 (decided Nov. 1951).

V.

Prejudice will be presumed from improper communications to the jury and need not be shown affirmatively.

Fillippon vs. Albion Vein Slate Co., 250 U.S. 76; 63 L. ed. 853;
Shields vs. U.S. 273 U.S. 583;
Parfet vs. Kansas City Life Ins. Co., 128 Fed. 2d 361;
Glasser vs. U. S., 315 U. S. 60, 86 L. ed. 680.

(A) It has always been the law of Illinois that the violation of a Constitutional, fundamental and inherent right and a departure from procedural requirements is per se

prejudicial. Prejudice need not be searched for. It is presumed from the occurrence itself.

Crabtree vs. Hagenbaugh, 23 Ill. 289;
People vs. Beck, 305 Ill. 593 at 596;
People vs. Rivers, 410 Ill. 410 at 419;
People vs. McGeoghegan, 325 Ill. 337 at 356;
People vs. Hoffman, 379 Ill. 318 at 323;
People vs. Lieber, 357 Ill. 423, from which we quote at P. 446:

"There is no well-founded rule of law which places the burden upon the defendant to show that he had been prejudiced by error. Loose language to the contrary may be found but it has no sound basis. The true rule everywhere is, that when error against a convicted defendant appears it is presumed to have improperly affected the result. This rule was enunciated by Mr. Justice Scholfield, in Kirby vs. People, 123 Ill. 436, and was later approved in People vs. Michael, 280 Ill. 11 ——— It is but a logical sequence to say that the burden of showing what the record discloses to rebut the presumption is upon the prosecution and not upon the defendant, for if the record fails to show that the error was not prejudicial, the presumption is conclusive."

VI.

Where the jury has debated for a long period prejudice is likely to occur from any visit or communication of the judge.

U.S. vs. Dunkel & Co., 173 Fed. 2d 506;
Nick vs. U.S., 122 Fed. 2d 660;
Burton vs. U.S., 196 U.S. 283 (307); 48 L. ed. 482 (490).

VII.

The intrusion of the trial judge into the jury room and his instructions and communications to them, when the court was not in session and in the absence of petitioner and his counsel was denial of due process.

People vs. McMiller, 410 Ill. 342;
Bailey vs. People, 190 Ill. 28;
People vs. Yurkiates, 404 Ill. 157;
People vs. Yurkiates, 404 Ill. 157;
Lewis vs. U. S., 146 U. S. 370; 36 L. ed. 607;
Diaz vs. U. S., 223 U. S. 442; 56 L. ed. 500;
Shields vs. U. S., 273 U. S. 583; 71 L. ed. 787;
Brashfield vs. U. S., 272 U. S. 448; 71 L. ed. 345;
Glasser vs. U. S., 315 U. S. 60; 86 L. ed. 680;
People vs. Humphreys, 353 Ill. 340;
People vs. Hotz, 327 Ill. 433.

ARGUMENT

The decision of the Supreme Court of Illinois in the instant cause deprives petitioner of the protection guaranteed by the Constitutions of Illinois and of the United States. From the admission of Illinois to the Union in 1818 until the decision of *People vs. Brothers*, 347 Ill. 530, the Supreme Court of Illinois invariably and without exception reversed every criminal conviction where the record showed that the jury was orally instructed or where proceedings were held in the absence of the accused.

Fisher vs. The People, 23 Ill. 218 at 231;
People vs. Beck, 305 Ill. 593 at 596;
Crabtree vs. Hagenbaugh, 23 Ill. 349;
People vs. McGrane, 336 Ill. 404;
Chicago & Alton Ry. vs. Robbins, 159 Ill. 598;
City of Mound City vs. Mason, 262 Ill. 392.

The *Brothers* decision was rendered February 19, 1932 and was the first and only departure from the established principle thoroughly established by the foregoing decisions. The present opinion of the Illinois Supreme Court is based solely upon the Brothers decision of 1932. Yet an examination of the Brothers decision demonstrates that the facts in the present case are wholly dissimilar from that decision. If the holding in the Brothers case were confined to the particular restricted and unavoidable circumstance disclosed in such opinion there would be but little reason to complain. But where, as was foretold and warned against in that opinion, such opening breach of the constitutional guarantee is again used and applied as in the instant case the flood gates are open wide to an extension of the ill-conceived doctrine and the guarantee of

a fair public and untrammeled jury trial guaranteed by the Illinois Bill of Rights is completely and forever nullified and abrogated.

A short comparison of the *Brothers* situation with the present case will suffice to demonstrate the vice of the present opinion. In the *Brothers* case a man was murdered by being shot in the back in cold blood. The identity of the killer was the only issue. At the conclusion of the trial the presiding judge, through oversight, submitted to the jury the usual forms of verdict given in such cases including a verdict for manslaughter. The jury, after deliberating a few hours, sent a communication to the judge, through the bailiff, asking whether further instructions were given concerning the manslaughter form of verdict. The Court had the bailiff bring all the instructions to the bench where after a conference with counsel the manslaughter form of verdict was removed from the series of instructions and the same were returned to the jury by the bailiff without comment from the Court. In view of the fact that the accused could not have been found guilty of manslaughter, the withdrawal of such form of verdict was held to be proper and without prejudice. In the *Brothers* case the Judge remained upon the bench and the jury remained in the jury room. In the *Brothers* case no communication, either verbal or written, was transmitted to the jury by the Court. In the *Brothers* case the inquiry did not concern the evidence, its weight, effect or meaning. In the *Brothers* case a complete record of the occurrence was preserved by the trial court. In the present cause the jury did not request any instruction from the Court. The visit of the judge to the jury room was gratuitous. The judge appeared before the jury in the jury room in person and addressed the jurors in person. In the present case a verbal discussion of the meaning and

interpretation of evidence took place between the judge and the jurors. In the present case neither counsel nor accused were present or aware of the occurrence. No record of the transaction was made by the trial judge. The occurrence was discovered accidentally by counsel in interviewing the jurors while preparing a petition for probation. In the instant case the Judge wholly departed from his judicial functions and did a thing which was both unnecessary and improper. In the *Brothers* case the act of the Judge was not calculated to nor could it conceivably influence the deliberations of the jury. In the instant case the conduct of the judge could have no other effect than to influence the jury deliberations.

Even the learned justice who wrote the majority opinion in the *Brothers* case, felt it necessary to admonish against any departure from the established rule, by stating at page 546 of the printed decision that "communications from Judge to jury should be made in open court in the presence of the parties and it is an almost universal rule that if any statements material to the issue be made by the judge to the jury in the absence of the defendant, a new trial will be awarded. Of such importance is an untrammeled deliberation by the jury that courts will generally grant a new trial when any communication with a jury, either by the judge or a third person, is in any way calculated to prejudice the defendant." Having so first announced the general rule the majority of the court then proceeded to find that the occurrence could not have prejudiced the rights of the accused and that the entire incident was unavoidable and thus excusable under the restricted facts and circumstances of that case. Two very able judges dissented upon the ground that adherence to established principles is preferable to specific deviations under particular and restricted circumstances. The closing words of the

dissenting opinions at page 561 are a better expression of the writer's views than it is possible for the writer at this time to create. The dissenting justices said:

> "If this single case were the only one to be affected by this judgment, it might not be a matter of serious importance, *but it is of serious importance if this case becomes a precedent.* A strict compliance with the practice of having all proceedings in court in the presence of the accused and his counsel with an opportunity to be heard at all stages of the trial, is a fundamental requirement of a jury trial in this state which has been maintained by an unbroken line of decisions. It is against the policy of the law of this state to indulge in secret communications between the judge and the jury and for the failure to observe this fundamental requirement, the judgment should be reversed."

In the case of *People vs. McMiller,* 410 Ill. 338, decided in November, 1951, in a trial before the court without a jury, the court had made private investigations out of the presence of the defendant and our Supreme Court reversed the cause, saying:

> "The right of a person accused of crime to a fair and impartial trial, according to the recognized rules of law and procedure, is not a mere formality but is a substantial part of the law of the land. When he waives a trial by jury he is entitled to the same fair and impartial treatment he would expect and be entitled to by a jury. (People vs. Hoffman, 379 Ill. 318.)"

Upon the same page of the Opinion, and at a later point, in referring to the conduct of the trial judge, the Court said that it:

> "is a violation of his constitutional rights."

Again in the case of *People vs. Rivers,* 410 Ill. 410, also a criminal case, upon page 419, the Court said:

> "When a defendant in a criminal case waives trial by jury and submits his right and liberty to a judge,

that judge is in the identical position of the jury and all the recognized rules for the protection of the defendant's rights apply with equal force. (People vs. Hoffman, 379 Ill. 318.) It is axiomatic that any unauthorized information reaching the jury is prejudicial error."

Also in this case upon page 416, the Illinois Supreme Court stated:

"The defendant in any criminal proceeding has an inherent and constitutional right that all proceedings against him shall be open and notorious and in his presence and any inquiry or acquisition of information or evidence outside of open court and outside of the presence of defendant, is prejudicial error. The defendant cannot be expected to know the scope and extent of any private inquiry made by the court outside of open court and he is not required to inquire into such matters and to resort to extraneous proof to show that he has been prejudiced. He has a right to rely upon his constitutional guarantee that nothing shall be considered against him except the competent evidence introduced in open court in his presence by the witnesses who confront him. . . . The question here is simply, does this record show any private investigation whatsoever by the court outside of the presence of the defendant. If it does, we must find prejudicial error or we will throw open the door to such private investigations and throw the burden on the defendant to show actual prejudice."

Continuing from the same decision, we quote further from page 419:

"It is axiomatic that any unauthorized information reaching the jury is prejudicial error."

The *Brothers* decision for the first time in the State of Illinois took out of the field of certainty the protection of fair jury trials and substituted for such certainty the construction which at various times, various courts, influenced

by various conditions, then existing, may see fit to put upon the same act. That such differences of opinion are not chimerically conjectured, is disclosed by the deviation in the Brothers opinion from the long consistent line of authorities adhered to in the State of Illinois for more than one hundred years. This danger is as aptly expressed by the dissenting opinions in the instant cause, as it is possible to express it. Mr. Justice Bristow dissenting in the present opinion said:

> "I am unable to discover any facts or reasons that would distinguish the *Brothers case* from the *Crabtree case*. The rule adopted by this court in the latter case in 1860 has been followed without interruption or deviation, with the exception of the *Brothers case*.
>
> "The reason for a continuation of the rule is obvious. If nothing is permitted to take place except in the presence of defendant and his counsel, then the defendant has full knowledge of anything and everything that happens that might influence the verdict. If the court is permitted to talk with the jury in the jury room in the absence of the defendant, then the defendant has no knowledge of what was said or done and would be at a disadvantage in proving that something improper took place. The remarks of the judge may be ever so harmless and innocous but his manner might be indicative of something—a facial distortion, a smile, a frown, a grimace,—might conceivably indicate approval, disappointment or contempt which might adversely affect defendant's cause. A litigant would face great difficulty in showing such facts in proving their influence upon the jury. It surely is against the policy of a law of this State to impose upon a defendant in a criminal proceeding such a burden.
>
> "The temptation of courts to avoid rules of procedure or statutory law because of their effect on a particular case should be avoided. It is submitted that the best interests of all the people will be served if we

continue to be a government of laws rather than a government of men and that courts should not assume the liability of disregarding rules of law established for the protection of litigants because of the notion that the violation of the rule had no effect on the particular case." (Tr. PP. 94-95.)

The dissenting opinion (Tr. PP. 88-95) analyzes the decisions of the courts of Illinois, and of the United States, in connection with this question. We respectfully call the attention of the court to this analysis which seems to render unnecessary the repetition of the exhaustive discussion of this important point by the writer.

In the majority opinion in this case in describing what occurred, the Court stated:

> "Defendant next alleges as prejudicial error that the trial judge was guilty of improper conduct in communicating with the jurors after they had retired to deliberate upon their verdict. The trial was concluded on a Saturday, and after the jury had retired it deliberated all night without arriving at a verdict. The next morning about eight o'clock the judge went to the jury room in the company of a bailiff, and inquired whether there was any hope of arriving at a verdict. One of the jurors stated they wanted further information, whereupon the judge told them to read the instructions. He explained further that any new instructions would have to be given in the presence of the attorneys and the defendant. One of the jurors then asked the meaning of defendant's waiver herein above referred to, and inquired whether defendant in that statement admitted performing an abortion. The judge replied, 'No, he specifically denies it.' Not long thereafter the jury reported the verdict." (Tr. P. 86.)

An analysis of the report of this visit of the Judge to the jury discloses these things: The jury tho unable to agree, had not requested additional instructions; the jury

specified the things about which it was not in agreement. One of those things referred to the so-called defendant's waiver, and inquiry was made by some member or members of the jury as to whether the defendant had admitted (by that waiver) performing an abortion. The judge replied, "No, he specifically denies it." The opinion then says, "not long thereafter the jury reported the verdict." The record and the opinion of the court disclose that this incident of the visit of the judge to the jury occurred on Sunday morning, probably sometime between 7:30 and 8:00 o'clock A.M.; that this jury had retired to deliberate about the verdict at about 9:00 o'clock on the Saturday night before. There had been an all night session, or approximately eleven hours, and they were not able to reach an agreement. For some reason, which can never be known, something changed that situation, and mysteriously and quite rapidly, a verdict was returned. It is anybody's guess as to why, if the debate of the jury had been "did he admit that he had performed the abortion, or did he deny it?", and the jury being convinced from the judge's statement that he had denied it, they would not have returned a verdict of not guilty. If, on the other hand, some expression of countenance or gesture of the Judge, which, of course, could not become any part of the record in the case, had led the jury to believe that there was no reliability in his denial, then it would be easy to see why the verdict of guilty was so soon returned by the jury.

There can be no question about the impropriety and danger of the incident in this case; there can be no doubt that it has long been the law of Illinois and other states, that no such incident should be tolerated, particularly in a capital case. A jury is not permitted to impeach its own verdict and the occurrence itself therefore, cannot be proven by the defendant, by evidence coming from the jury.

The occurrence having been secret and nothing appearing of record ordinarily escapes detection by the accused. Whether for this reason or for others, it has been the invariable rule of law that where improper communications have occurred between the Court and the jury, prejudice has necessarily occurred and is *ipso facto* presumed. A breach of the constitutional guarantees extended to all persons accused of crime, always indicates prejudice. To cast upon the accused the burden of convincing a reviewing court that the violation of his constitutional rights and privileges has been harmful to the accused is an impossible burden. In several of the Illinois decisions cited in the foregoing Brief, the Illinois Supreme Court has said that the occurrence itself is intolerable and that a departure into the speculative realm of prejudice or lack of prejudice will not be indulged in by the reviewing court. The question is simplified by the statement that the deprivation of constitutional rights is necessarily and in all cases prejudicial, and that a new trial is always preferable to a speculative discussion concerning the particular effect of the particular deprivation in the particular case.

The gratuitous visit of the trial judge to the jury room and the verbal discussion between the judge and the jury, concerning the meaning and effect of a vital piece of evidence, when court was not in session, and when the accused and counsel were absent, under no stretch of the imagination could be anything but improper and prejudicial. Coming as it did after a trial lasting six days, with closing arguments on Saturday evening, and after deliberating all night, until the Sabbath morning, preceding the Lincoln Birthday holiday, when the jury would naturally wish to go to their homes, created a ready opportunity for the jury to accept any apparent justification for reaching a verdict and endng the ordeal of further divided or dead-

locked deliberations. The fact that a jury apparently hopelessly divided and unable to agree after eleven hours of deliberation, could arrive at a verdict of manslaughter, within an hour after the judge had discussed the case verbally with such jury, in and of itself conclusively demonstrates the pernicious effect which such improper and unauthorized invasion of the jury's deliberations must have had upon such verdict.

The cases cited in our foregoing Brief of Points and Authorities support in every particular the thoughts which we here express. We seek and we ask adherence to established principles. We request that the accused in this case be accorded his constitutional rights and privileges. We seek due process of law and a fair, public trial for the accused.

We respectfully therefore, submit that the judgment of the Supreme Court of Illinois should be reversed with directions that the cause be remanded to the trial court for further hearing.

Respectfully submitted,

ARTHUR M. FITZGERALD,
504 East Monroe Street,
Springfield, Illinois.
Attorney for Petitioner.

APPENDIX

(Opinion of the Supreme Court of the State of Illinois)

Docket No. 32057—Agenda 5—November, 1951

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error

vs.

RONALD U. TILLEY, Plaintiff in Error

Mr. Justice Crampton delivered the opinion of the court:

Plaintiff in error, Ronald U. Tilley, hereinafter referred to as defendant, was found guilty of manslaughter, after a trial by jury in the circuit court of Sangamon County. He was sentenced to the penitentiary for a term of not less than four nor more than ten years. He brings the cause here for review, listing 38 assignments of error. The cause was before this court, on review of a previous trial, in *People* v. *Tilley*, 406 Ill. 398, and was remanded for a new trial because of certain errors not involving the weight of evidence.

The record discloses that on July 20, 1946, Renee Stanley, a woman nineteen years of age, died in a hospital as the result of peritonitis caused by an abortion. In an oral statement made on the evening before her death she revealed to her physician and to Frank M. Pfeifer, an assistant State's Attorney, that she had been pregnant and on July 9 had gone to defendant's office for an abortion; that he used an instrument on her private parts, and after applying a packing of gauze and cotton told her to go home; that on a subsequent visit the procedure was repeated; and that on the following day she became violently ill. Her statement, as testified to by Pfeifer and the physician, was admitted into evidence as a dying declaration. It was the only evidence tending to connect defendant with the death of the girl.

Defendant did not testify. In the course of the trial, after the State's Attorney began to prove intent by evidence that similar crimes had been committed by defendant on previous occasions, the latter signed a waiver stating that if it was proved he performed the abortion then he agreed the abortion was not necessary to save the life of the girl and no proof of criminal intent should be necessary. The waiver was introduced into evidence.

The assignments of error as argued in the briefs fall into five groups which we shall consider accordingly. Defendant first contends the statement of the deceased was not properly admitted into evidence for the reason that she was extremely ill, under the influence of drugs and medicine, and was not in sufficient possession of her mental faculties to understand [fol. 10] the transaction. This same contention was disposed of by our previous opinion in this case, on evidence substantially similar to that contained in the present record, and need not be discussed at length herein. The assistant State's Attorney who questioned her testified she talked coherently and intelligibly; the clergyman who administered the last rites of her church testified she was coherent and lucid; and her physician testified that in his opinion her mental condition was very clear at the time the statement was obtained, that she was conscious and aware of what was going on, that she was mentally alert and lucid, and that peritonitis victims are generally alert. Questions concerning the credibility of the witnesses and the weight to be given their testimony are matters for the court on the preliminary examination, or for the jurors when the witnesses testify before them, and this court will not substitute its judgment on such matters for that of the trial court or the jury. *People v. Tilley*, 406 Ill. 398.

It is also contended the court erred in admitting into evidence the preserved female parts of the deceased and allowing them to be exhibited to the jury: that such evidence could serve no useful purpose except to arouse anger and prejudice. This contention must likewise be rejected. The court has a reasonable discretion in the admission or rejection of exhibits in evidence. Even though the jury may have a full description of the injury by the testimony of physicians, it is not an abuse of discretion to admit in evidence the uterus itself to aid the jury in understanding the nature and extent of the injury and in determining how the offense was committed. It at least tended to prove a circumstance to be considered by the jury along with all the other evidence. See *People* v. *Tilley*, 406 Ill. 398; *People* v. *Hobbs*, 297 Ill. 399.

Further assignments of error are predicated upon the trial court's refusal to give certain instructions tendered by defendant. Eight instructions are specified. They concern the weight to be given the dying declaration, and refer to particular circumstances and conditions under which the statement was given, such as the effect of the drugs, medicine and illness upon the recollection and memory of deceased and her ability to understand what was happening. We have considered them in order and find in each case that the instruction is either improper, unnecessary or repetitious. Other instructions given by the court at defendant's request informed the jury that a dying declaration [fol. 11] is not the best evidence, and that the circumstances under which it is made, such as the physical and mental condition of the declarant, and the method and manner of taking it, "may be taken into consideration in determining the credibility or weight to be given such declaration." The court gave seventeen instructions tendered by defendant and nine tendered by the People. We think the jury was

sufficiently instructed as to all those parts of the refused instructions which were proper to be given. Defendant tendered 41 instructions, a number far in excess of that necessary for the points involved in the case, and he is not in a position to complain that the court, in the length of time it could devote to consideration of the instructions, refused Ill. 612.

Defendant next alleges as prejudicial error that the trial judge was guilty of improper conduct in communicating with the jurors after they had retired to deliberate upon their verdict. The trial was concluded on a Saturday, and after the jury had retired it deliberated all night without arriving at a verdict. The next morning about eight o'clock the judge went to the jury room in the company of a bailiff, and inquired whether there was any hope of arriving at a verdict. One of the jurors stated they wanted further information, whereupon the judge told them to read the instructions. He explained further that any new instructions would have to be given in the presence of the attorneys and the defendant. One of the jurors then asked the meaning of defendant's waiver herein above referred to, and inquired whether defendant in that statement admitted performing an abortion. The judge replied, "No, he specifically denies it." Not long thereafter the jury reported the verdict.

It is insisted that any communication whatever between the judge and the jury, except in open court with the defendant present, is prejudicial error entitling defendant to a new trial. Several early decisions are cited in which the language of the court tends to support this contention. But the holdings in such cases were discussed in *People* v. *Brothers*, 347 Ill. 530, wherein an exhaustive review of the authorities on the present question was made, and the rule

was announced that judgments will not be reversed when it is apparent that no injury has resulted from a communication to the jury, either by the court or by third persons. In that case the judge received from the jurors a [fol. 12] request for information concerning a form of verdict submitted for use in case defendant was found guilty of manslaughter. In defendant's absence he thereupon withdrew the form of verdict from the jury. There had been no evidence in the case to warrant the giving of an instruction on that subject or a form of verdict concerning it, and the latter had been submitted through inadvertence. It was held that the action of the trial judge was not prejudicial error, and the judgment, entered upon a verdict finding defendant guilty of murder, was affirmed. In the case at bar the judge merely inquired as to the possibility of a verdict, and, in response to questions by the jurors, advised them to read their instructions, explained that any new ones would have to be made in the presence of defendant and the attorneys, and stated that defendant in signing the waived did not admit performing an abortion. While the action of the judge in communicating at all with the jurors under these circumstances was highly imprudent, it is clear that the statements, in themselves, could by no possibility work an injury to defendant's interests. The communica- - was neither prejudicial to him nor calculated to influence the jury. Although we do not wish to imply the slighest sanction to such practices, we think that in view of its nature the present communication would not warrant setting aside the verdict or reversing the judgment. As we observed in the *Brothers case:* "Privacy of jury deliberations should be zealously protected against invasion, but the cardinal test on a motion to set aside a verdict on that ground is whether or not the invasion was calculated to influence the verdict of a jury. If it was not so calculated

it would be idle to disturb a verdict. Often it is practically impossible to prevent a juror from communicating with a trial judge, as when he approaches the judge and asks permission to telephone to his family or to say that he is sick. surely, such harmless communications of themselves are an insufficient excuse for setting aside a verdict or reversing a judgment."

Defendant lastly urges that the evidence is such that it admits of but one of two conclusions, either defendant is guilty of murder or he is innocent; and that the court erred in giving a manslaughter instruction. In support of this contention he argues that the element of intent to commit the act when not necessary to save the mother's life being admitted by the waiver, any question of manslaughter was thereby removed from the case. We find no merit [fol. 13] in the contention. The offense of involuntary manslaughter includes the killing of a human being without any intent to do so, in the commission of an unlawful act. (Ill. Rev. Stat. 1949, chap. 38, par. 363.) The waiver or agreement entered into in the trial court does not eliminate any of the elements of such offense from the case at bar. The intent therein stipulated was not an intent to cause death but merely an intent to perform the unlawful act of causing an abortion when not necessary to save the mother's life. While the statute contemplates that persons performing such acts shall be guilty of murder when death results, it does not remove the offense from the definition of manslaughter. As we have heretofore construed the statutes, "they do not take the offense here charged out from under the definition of manslaughter, but define this and similar offenses, under certain conditions, to constitute also the more serious offense of murder." (*People* v. *Carrico*, 310 Ill. 543.) Defendant cannot complain that the jury convicted him of the lesser offense of manslaughter.

Upon examination of this record we are convinced that defendant has had a fair and impartial trial notwithstanding the irregularity hereinabove discussed. It is not the purpose of a reviewing court to determine whether a record is perfect, but to determine whether the accused has had a fair trial under the law and whether his conviction is based on evidence establishing his guilt beyond all reasonable doubt.

Defendant has failed to show any prejudicial error, and the judgment of the circuit court of Sangamon County is, therefore, affirmed.

Judgment affirmed.

Mr. Justice Bristow, dissenting:

I am forced to dissent in this case because the majority opinion lends support to a decision (*People* v. *Brothers*, 347 Ill. 530), which this court should overrule. On page 547 of the opinion in the *Brothers case* the court made the following pronouncement: "In each of these cases the conduct of the judge was calculated to influence the deliberation of the jury and therefore constituted reversible error, but no case is cited, and, indeed, we have not been able to find one, where this court has reversed a judgment because of an act or ruling of a judge which did not tend to influence the verdict of a jury." The cases referred to in the opinion were the following: *Crabtree* v. *Hagenbaugh*, 23 Ill. 289; *Chicago and Alton Railroad Co.* v. *Robbins*, 159 Ill. 598; *City of Mound City* v. *Mason*, 262 Ill. 392; *People* v. *Beck*, 305 Ill. 593; *People* v. *McGrane*, 336 Ill. 404. An analysis of those [fol. 14] cases shows conclusively that the court misunderstood or misinterpreted their holdings on the question under consideration.

In *Crabtree* v. *Hagenbaugh*, 23 Ill. 289, after the jury had

retired to consider their verdict in a civil suit they sent for the judge, who repaired to their room and there had intercourse with them on the subject of the instructions which had been given them. In reversing a judgment the court said (289): "In this case, after the jury had retired to consider of their verdict, they sent for the judge, who repaired to their room, and there had intercourse with them on the subject of the instructions which had been given them. This was manifestly done with no improper motive on the part of the judge, and it may be that it had no influence with them in the formation of their verdict. Indeed, the most the judge did, was to decline to explain the meaning of the written instructions which had been given to the jury. We choose to assume, that what was said and done by the judge, while in the jury room, did not influence the jury in their deliberations, for we think that, independent of its effect upon the jury, the judgment should be reversed, for the simple reason that such an interview did take place. If, in this case, no harm was actually done, and for that reason the verdict is allowed to stand, we open the door to the inquiry in all such cases, as to whether the party had been injured by the interview. Such an inquiry should not be tolerated. The policy of the law requires, that all the proceedings of the court should be open and notorious, and in the presence of the party, so that if he is not satisfied with it, he may take exceptions to it, in the mode pointed out by the law, and not be put to extraneous proof to show that an error has been committed in a secret proceeding, and, in fact, out of court."

In *Chicago and Alton Railroad Co.* v. *Robbins,* 159 Ill. 598, in a civil suit, after the jury retired to consider its verdict it sent a written communication to the judge inquiring, if the jury should find for the plaintiff, whether the damages should be assessed up to the commencement

of suit or up to the present time. This inquiry was brought to the judge by the bailiff and the court wrote thereon and sent the same back by the bailiff, "Up to the present time." This was done while the court was in session but after counsel on both sides had retired from the court, and while neither of said counsel were present in court. There was a judgment in favor of the plaintiff and the Supreme Court [fol. 15] said that the proposition of law embodied in the direction of the court, when applied to the facts of the case in hand, was not erroneous, but reversed the judgment solely on the action of the court in sending the memorandum to the jury. In doing so they discussed *Sargent* v. *Roberts*, 1 Pick, 337 (Mass.), and also *O'Connor* v. *Guthrie & Jordan*, 11 Iowa, 80, both of which cases held that, regardless of prejudice, such communication was not permissible, and approved a statement in the Iowa case (601): "Indeed, the necessity for adhering to this practice with strictness is so manifest that argument in support of it is quite unnecessary. It may, at times, it is true, be attended with inconvenience; but better so than permit a practice so liable to abuse and so much in conflict with the rights of parties litigant."

The court then said that the decisions of this court are of like import and cited *Crabtree* v. *Hagenbaugh*, 23 Ill. 289, and *Fisher* v. *People*, 23 Ill. 218.

In *City of Mound City* v. *Mason*, 262 Ill. 392, in an opinion by Justice Dunn, a judgment in a civil suit was reversed where the court had gone to the jury room and made oral answers to several questions asked him by the jury in regard to appellant's rights, and the court said (399): "It is error, for which a judgment will be reversed, for a trial judge to hold any communication with the jury in regard to the instructions in the case except in open court. It is im-

material whether the instructions given were right or wrong. 'The policy of the law requires that all the proceedings of the court should be open and notorious and in the presence of the party, so that if he is not satisfied with it he may take exceptions to it in the mode pointed out by the law, and not be put to extraneous proof to show that an error has been committed in a secret proceeding, and, in fact, out of court.' "

In *People v. Beck,* 305 Ill. 593, a criminal case involving a misdemeanor, a judgment of conviction was reversed in an opinion by Justice Dunn where the jury sent a note by the bailiff to the judge making an inquiry as to the right to manufacture liquor for one's own use before July 1, 1921. The judge, in the absence of the defendant and his counsel, stated to the jury that he could not instruct them orally in response to the inquiry and read to them an instruction. The court held that the instruction was erroneous but further held (596): "Regardless of the question of the correctness of the instruction the action of the court was error for [fol. 16] which the judgment must be reversed."

The court then said (596): "The defendant was entitled to a public trial by jury, in every part of which he had a right to participate, to be present at every stage of the proceedings, to know everything that was done, to make objections, and to take such action as he might think best for securing his rights and for his protection. The law is well settled in this State that it is error for which a judgment will be reversed for a trial judge to hold any communication with the jury after their retirement to deliberate upon their verdict, except in open court." The opinion then copiously quotes from the opinions in *Chicago and Alton Railroad Co.* v. *Robbins,* 159 Ill. 598, *City of Mounty City* v. *Mason,* 262 Ill. 392, and *Fisher* v. *People,* 23 Ill. 218.

In *People* v. *McGrane*, 336 Ill. 404, Justice DeYoung wrote an opinion reversing a conviction for assault with intent to commit murder. In that case the jury retired to consider their verdict at 5:30 P.M. Five hours later the officer in charge of the jury brought the following communication to the judge: "Honorable Judge, would it be a fair question to ask your honor the minimum and maximum sentence on both verdicts? C. W. Rimsnider, Foreman." The State's Attorney and counsel for the plaintiff in error were present at the time and the jury stated that the jury was entitled to an instruction on the question asked. He directed the officer to bring the jury into the courtroom, and in the absence of the plaintiff in error gave the jury an instruction in the language of the statute on assault with intent to commit murder and the penalty therefore. Counsel for the plaintiff in error was present and excepted to the giving of the instruction. The judgment was reversed solely for this error of the court, and in doing so the court said (408): "Section 9 of the bill of rights prescribes that in all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel. Section 8 of division 13 of the Criminal Code (Cahill's Stat. 1927, p. 953; Smith's Stat. 1927, p. 1021), provides that all trials for criminal offenses shall be conducted according to the course of the common law. By the common law the personal appearance of a person accused of a felony was required throughout the trial and it was also required that the record show the fact. (*Sewell* v. *People*, 189 Ill. 174; *Harris* v. *People*, 130 id. 457.) The plaintiff in error was entitled to a public trial by jury [fol. 17] at every stage of which he had the right to be present and in every part of which he had the right to participate for his protection. (*People* v. *Beck*, 305 Ill. 593; *People* v. *Harris*, 302 id. 590); *People* v. *Weinstein*, 298 id. 264; *Crabtree* v. *Hagenbaugh*, 23 id. 289; *Brown* v. *State*, 24 Ark.

620; *Roberts* v. *State,* 111 Ind. 340; *State* v. *Smith,* 44 Kan. 75; *Jones* v. *State,* 26 Ohio St. 208; *Hooker* v. *Commonwealth,* 54 Va. 763; 1 Bishop's Crim. Proc.—3d ed.—sec. 273; 2 Wharton's Crim. Proc.—10th ed.—sec. 1484.) The giving of the instructions to the jury is a part of the trial and the accused person has a right to hear the instructions read. Inquiry will not be made into the correctness of an instruction given in his absence, and the error is not cured by the presence of the defendant's counsel, since his attorney has no power to waive his right to be present in court. (*Bonner* v. *State,* 67 Ga. 510; *Maurer* v. *People,* 43 N. Y. 1; *Shipp v. State,* 11 Tex. Crim. App. 46.) That right may only be waived by the defendant himself."

The unsoundness of the opinion in the *Brothers case* is clearly shown by the dissenting opinion of Justices Dunn and De Young which points out the rule established in Illinois, and also in many other States, and the importance of the rule is stated in the dissenting opinion (561): "If this single case were the only one to be affected by this judgment it might not be a matter of serious importance, but it is of serious importance if this case becomes a precedent. A strict compliance with the practice of having all proceedings in court in the presence of the accused and his counsel, with an opportunity to be heard at all stages of the trial, is a fundamental requirement of a jury trial in this State which has been maintained by an unbroken line of decisions. It is against the policy of the law of this State to indulge in secret communications between the judge and the jury, and for the failure to observe this fundamental requirement in jury trials, the judgment, in our opinion, should be reversed."

Counsel for the People cite some decisions of Federal courts of appeal holding that it is necessary that prejudice appear before there should be a reversal because of the

court communicating with a jury after it retires to consider its verdict. However, in the case of *Brashfield* v. *United States,* 272 U. S. 448, 71 L. Ed. 345, the Supreme Court calls attention to the fact that the decisions of the courts of appeal of the United States are conflicting, but, [fol. 18] in a conviction for violation of the prohibition law, the Supreme Court, in an opinion by Justice Stone, followed the rule that has been adopted in Illinois and reversed a conviction because the trial judge inquired how the jury was divided numerically and was informed by the foreman that it stood 9 to 3, without indicating which number favored conviction. The reversal was upon that error of the court alone.

In *Shields* v. *United States,* 273 U. S. 583, 71 L. Ed. 787, in an opinion by Justice Taft, a judgment of conviction for conspiracy was reversed where the error of the court was that, after the jury sent a written communication to the court that it found certain defendants guilty and was unable to agree as to the three defendants, the judge sent back the communication with the following written reply: "The jury will have to find also whether Shields, Widman and Gastman are guilty or not guilty." This communication was not made in open court and neither the defendants nor their counsel was present, and afterwards the jury brought in a verdict finding all defendants guilty. The Court of Appeals affirmed by the Supreme Court reversed and called attention that such action of the trial court had been condemned in civil suits and said: "If this be true in a civil case, *a fortiori* is it true in a criminal case." In that case it also appeared that counsel for the government and the defendants had requested the court to keep the jury out until it agreed, but the court said that such request did not authorize the action of the court.

I am unable to discover any facts or reasons that would distinguish the *Brothers case* from the *Crabtree case.* The

rule adopted by this court in the latter case in 1860 has been followed without interruption or deviation, with the exception of the *Brothers case.*

The reason for a continuation of the rule is obvious. If nothing is permitted to take place except in the presence of defendant and his counsel, then the defendant has full knowledge of anything and everything that happens that might influence the verdict. If the court is permitted to talk with the jury in the jury room in the absence of the defendant, then the defendant has no knowledge of what was said or done and would be at a disadvantage in proving that something improper took place. The remarks of the judge may be ever so harmless and innocuous but his manner might be indicative of something—a facial distortion, a smile, a frown, a grimace—might conceivably indi- [fol. 19] cate approval, disappointment or contempt which might adversely affect defendant's cause. A litigant would face great difficulty in showing such facts in proving their influence upon the jury. It surely is against the policy of a law of this State to impose upon a defendant in a criminal proceeding such a burden.

The temptation of courts to avoid rules of procedure or statutory law because of their effect on a particular case should be avoided. It is submitted that the best interests of all the people will be served if we continue to be a government of laws rather than a government of men and that courts should not assume the liberty of disregarding rules of law established for the protection of litigants because of the notion that the violation of the rule had no effect on the particular case.

In view of the foregoing, I respectfully disagree with the majority opinion.

Mr. Justice Maxwell concurs in the foregoing dissenting opinion.